# Supreme Court of the United States.

OCTOBER TERM, 1904.

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| WILLIAM B. WETMORE, Plaintiff in Error, AGAINST ANNETTE B. MARKOE (formerly ANNETTE B. W. WETMORE), Defendant in Error. | No. 56. |

## ARGUMENT AND BRIEF ON BEHALF OF DEFENDANT IN ERROR.

This case comes before this Court on writ of error (p. 118), to review an order of the Appellate Division, First Department, of the Supreme Court of the State of New York, of May 26th, 1902 (p. 92), which affirmed an order of the Supreme Court of the State of New York, made at Special Term December 30th, 1901 (p. 89), which last mentioned order denied the application of the plaintiff in error "for an order enjoining and restraining the above named plaintiff (here the defendant in error) and her attorneys from issuing execution upon the judgment of this Court dated the 1st day of April, 1892, or if execution has been issued, from enforcing the same in any way for the collection of arrears of

alimony and allowance for the support and education of the three children of the said plaintiff and defendant under said decree of divorce which accrued and became due on or before January 13th, 1899, amounting to the sum of $19,221.60, and from collecting or attempting to collect the judgment in this action so far as relates to such arrears, or from instituting any proceeding in this action or in any action or actions founded upon claims for arrears of alimony and allowance for the support of said children and from perpetually enjoining and staying all proceedings in this action or any other action founded upon such arrears or upon any cause of action arising therefrom upon the part of the plaintiff herein or her attorneys or agents, or on the part of any person or corporation acting or pretending to act on the part of said plaintiff or her attorneys or agents, and for such other and further relief as to the Court may seem proper."

From the order now sought to be reviewed an appeal was taken to the Court of Appeals, the Court of last resort and of highest appellate jurisdiction in the State of New York, and after the appeal had been submitted by the appellant and argued by the counsel for the respondent that appeal was dismissed (p. 96).

## Assignment of Errors.

The assignment of errors printed at pages 115 and 116 is that the Supreme Court of the State of New York at Special Term and in the Appellate Division erred in not granting the injunctive relief asked for by the plaintiff in error and also erred in deciding that the arrears of alimony and allowance which had accrued and become due to the plaintiff from the defendant on or prior to the 13th day of January, 1899, under the judgment entered herein on April 1st, 1892, were not a provable debt within the intent and meaning of the Bankruptcy Act of July 21st, 1898, and that

the discharge of the defendant under the Bankruptcy Act did not release the amount owing by him for such arrears of alimony and allowance.

## Statement.

It does not appear affirmatively from the Record that the Appellate Division of the Supreme Court of the State of New York rested its order of affirmance on the Federal question.

On April 1st, 1892, in the Supreme Court of the State of New York for the City and County of New York the plaintiff obtained a judgment of absolute divorce against the defendant William B. Wetmore because of his adultery, which judgment granted to the plaintiff liberty to resume her maiden name and adjudged and declared that it should be lawful for her to marry again in the same manner as if the defendant William B. Wetmore were actually dead, but that it should not be lawful for him to marry again until the plaintiff is actually dead; and which judgment also required him to pay to her $3,000 annually, in quarterly payments, as alimony and also $3,000 annually, in quarterly payments, for the maintenance and education during minority of the three children, issue of the marriage, whose custody was awarded to the plaintiff; and the defendant was also required by the judgment to give two bonds each for $25,000, one to secure the payment of the alimony, and one to secure the payment of the sums awarded for the maintenance and education of his three infant children (pp. 15 to 20).

The defendant, William B. Wetmore, after the judgment of divorce had been entered, left the State of New York, and he has remained absent therefrom ever since, and in violation of the judgment he married again (p. 4, p. 109 *e*, and p. 29). He has never given either of the two bonds required by the judgment, nor has he ever voluntarily paid one dollar for alimony or for the maintenance or education of either of his three infant children (p.

29, and p. 109 e), and he has kept himself continuously without the jurisdiction of the Courts of the State of New York (p. 21, and p. 109 e).

The unpaid accrued alimony including the sum awarded for the maintenance and education of the three infant children amounted at the time of the defendant's application to upwards of $30,000 (p. 22). The defendant in his affidavit on which he moved for the relief which was denied him by the order which was affirmed by an order of the Appellate Division of the First Department of the Supreme Court of the State of New York which latter order is the one now sought to be reviewed, he stated that he is now able to pay the amounts due under the judgment of divorce, and also stated in the same affidavit that he is desirous and is ready "to comply with the said judgment of divorce as soon as it shall be declared that my said discharge in bankruptcy has relieved me from the aforesaid arrears" (p. 9).

In April, 1901, the defendant made a motion in this action which included the same relief asked for on the motion which resulted in the order which was affirmed by the order now sought to be reviewed After argument before the Special Term of the Supreme Court of the State of New York that motion was denied by the order dated at Special Term the 30th day of April, 1901 (a copy of that order is printed at pp. 33 to 37). On denying that motion the learned Judge reviewed the facts at some length as fully appears in his opinion which is reported in

Wetmore *vs.* Wetmore, 34 Misc. Rep. (N. Y.), 640.

It also appears that in the bankruptcy proceedings no claim for alimony or for the maintenance or education of the three infant children was proved (p. 25).

The plaintiff, however, did prove a claim for the value of certain personal property belonging to her

which had been unlawfully converted by the defendant to his own use (pp. 25 to 27).

In the Court below the defendant in error, there the plaintiff, contended that her claim for alimony and for the maintenance and education of her three infant children was not a debt provable in bankruptcy, and that the discharge in bankruptcy would not relieve the plaintiff in error from liability to pay the same (p. 21). The only moneys which she ever received on account of the alimony and for the maintenance and education of the three infant children, under the judgment of divorce, were certain payments which had been made to her from time to time by the New York Life Insurance and Trust Company and by the Continental Trust Company of the City of New York, pursuant to a judgment in equity made in an action in the Supreme Court of the State of New York, wherein the defendant in error was plaintiff and Sarah Taylor Wetmore, as trustee, under the will of Samuel Wetmore, deceased, and the plaintiff in error, were defendants (pp. 21 and 22), which judgment required that the net income of the trust fund of $100,000 should be paid to the defendant in error from time to time, whenever and so long as the plaintiff in error should be in default in paying the alimony and the moneys awarded for the maintenance and education of the three infant children, directed to be paid in and by the judgment of divorce and which equity judgment was subsequently modified so as to limit the annual payments to be made from the income of the trust estate to the sum of $3,000 per annum, to be used toward the maintenance and education of the three infant children. The moneys so received were not sufficient to pay the alimony and the amounts awarded for the maintenance and education of the children under the judgment of divorce, and, after crediting all moneys received from the two trust companies, there remained due to the defendant in error, under the judgment of divorce, for alimony and for the amounts awarded for the

maintenance and education of the infant children, upwards of $30,000 (p. 22).

For a long time before the plaintiff in error filed his petition in bankruptcy, and at the time of the filing thereof, his mother Sarah Taylor Wetmore, was in very feeble and precarious health, and during all that time was a lady of large wealth, and the plaintiff in error was her only child, and, after he had filed his petition in bankruptcy, and pending his discharge and subsequent to his adjudication in bankruptcy his mother died on March 21st, 1899, leaving a will by which she gave all her residuary estate to the plaintiff in error and by which she appointed him the executor thereof, and under the will he became possessed of a large property and estate (p. 23).

In an affidavit made by the plaintiff in error a quotation from which appears at page 31 he deposed as follows:

"Since the said adjudication in bankruptcy I have become, through the death of my mother and under the provisions of her will, of sufficient means to discharge the arrears of alimony, which are claimed to be due and owing to the plaintiff, and I am ready and hereby offer and stand ready to pay the amount which has accrued and is payable whether before or subsequent to my adjudication in bankruptcy, providing only that the question as to what may be due and owing shall be finally determined by a proper tribunal, which I am advised is the United States Supreme Court, and that the question can and will be brought before that Court for final determination, and until such final determination it cannot authoritatively be declared whether under the present Bankruptcy Act a discharge in bankruptcy does or does not discharge arrears of alimony."

## First Point.

**The writ of error should be dismissed because the record fails to show jurisdiction in this Court to entertain the case.**

(*a.*) While the record shows at page 88 that Mr. Justice Scott at Special Term denied the application on the Federal question that the discharge in bankruptcy did not relieve the bankrupt from the payment of past due alimony and allowance for the support of his infant children, the record does not show that that was the ground on which the decision of the Appellate Division, First Department of the Supreme Court of the State of New York, affirmed the order appealed from to that Court.

That court affirmed without opinion (p. 93).

Neither does the record disclose the grounds upon which the Court of Appeals dismissed the appeal.

The record shows at pages 109*h* to 109*m* that in the Court of Appeals other questions than the Federal question were argued, notably at page 109*h*, where the point was made that the defendant, being in contempt, was entitled to no consideration and was not in a position by appeal to ask for the relief he sought on the appeal to that Court.

In Walker *v.* Walker, 82 N. Y., 260, the Court of Appeals held that the Court has power, when and while a defendant in an equity action is in contempt, having disobeyed its order, to refuse to hear him, and at page 264 Chief Justice Folger, in delivering the opinion of the Court, says:

"We are brought to the conclusion that there has long been exerted by the Court of Chancery in England the power to refuse to hear the defendant when he was in contempt of the court by disobeying its orders, and that that power was in the Courts of Chancery of this country."

It is a rule of law in the State of New York that an affirmance without an opinion makes the Appel-

late Court only responsible for the point decided below and not for the reasons given or opinions expressed.

Rogers *vs.* Decker, 131 N. Y., 490.

The point decided below by the Special Term order (p. 89) was that the Court would not grant to the plaintiff in error the injunctive relief he sought, and that point was affirmed on appeal, and from the authority last above cited this Court cannot say that the affirmance was for the reasons given by the Court at Special Term.

This Court has held that where the Supreme Court of a State decides a Federal question in rendering a judgment and also decides against the plaintiff in error on an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

Hale *v.* Akers, 132 U. S., 554.

In Hale *v.* Akers, *supra*, the Court said, at page 564:

"Both of the courts below decided that, irrespective of the Federal question, the agreement of October 11th, 1860, was decisive of the case. The construction of that agreement involved no Federal question, and controlled the whole case.

In Murdock *v.* City of Memphis, 20 Wall., 590, 636, this Court announced, as one of the propositions which flowed from the provisions of the second section of the act of February 5th, 1867, 14 Stat., 386, embodied in Section 709 of the Revised Statutes of 1874, and still in force, that even assuming that a Federal question was erroneously decided against the plaintiff in error, the Court must further inquire whether there was any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that Court, notwithstanding the error in deciding the issue raised by the Federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue.

This principle has been repeatedly applied. In Jenkins *v.* Loewenthal, 110 U. S., 222, where two defenses were made in the State court, either of which, if sustained, barred the action, and one involved a Federal question and the other did not, and the State court in its decree sustained them both, this Court said that, as the finding by the State court of the fact which sustained the defense which did not involve a Federal question was broad enough to maintain the decree, even though the Federal question was wrongly decided, it would affirm the decree, without considering the Federal question or expressing any opinion upon it, and that such practice was sustained by the case of Murdoch *v.* City of Memphis, *supra* (see also, McManus *v.* O'Sullivan, 91 U. S., 578; Brown *v.* Atwell, 92 U. S., 327; Citizens' Bank *v.* Board of Liquidation, 98 U. S., 140; Chouteau *v.* Gibson, 111 U. S., 200; Adams County *v.* Burlington & Missouri Railroad, 112 U. S., 123; Detroit City Railway *v.* Guthard, 114 U. S., 133; New Orleans Water Works Co. *v.* Louisana Sugar Refining Co., 125 U. S., 18; De Saussure *v.* Gaillard, 127 U. S., 216, 234."

(*b.*) As the record does not show affirmatively that the Appellate Division, First Department, of the Supreme Court of the State of New York, affirmed the order of the Court below on the Federal question, there being other questions, notably the question of the contempt of the plaintiff in error, on which the order could have been affirmed, this Court will not entertain jurisdiction of this case under the well-established doctrine enunciated in its decisions, to the effect that to give this Court jurisdiction of a writ of error to a State court it must appear affirmatively not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

De Saussure *v.* Gaillard, 127 U. S., 216, 234.

In De Saussure *v.* Gaillard, *supra*, at page 234, the Court said:

"And it has been repeatedly decided, under Section 709 of the Revised Statutes, that to give this Court jurisdiction of a writ of error to a State court it must appear affirmatively not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it (Brown *v.* Atwell, 92 U. S., 327; Citizens' Bank *v.* Board of Liquidation, 98 U. S., 140; Chouteau *v.* Gibson, 111 U. S., 200; Adams County *v.* Burlington & Missouri Railroad, 112 U. S., 123; Detroit City Railway *v.* Guthard, 114 U. S., 133; New Orleans Water Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S., 18)."

In New Orleans Water Works Co. *v.* Louisiana Sugar Refining Co., 125 U. S., 18, *supra*, the Court, referring to the rule above mentioned, adds at page 29:

"And in many recent cases under Section 709 of the Revised Statutes, this Court, speaking by the Chief Justice, has reasserted the rule that to give it jurisdiction of a writ of error to a State court it must appear affirmatively not only that a Federal question was presented for decision to the highest court of the State having jurisdiction, but that 'its decision was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it.'" (Citing, 92 U. S., 327, *supra;* 98 U. S., 140, *supra;* 111 U. S., 200, *supra;* 112 U. S., 123, *supra;* 114 U. S., 133, *supra*).

In San Francisco City and County *v.* Itsell, 133 U. S., 65 and 66, the Court said:

"This Court has no jurisdiction to review a judgment of the highest court of a State, unless a Federal question has been either in express terms or by necessary effect decided by that court against the plaintiff in error."

In Detroit City Railway Co. *v.* Guthard, 114 U. S., page 133, *supra*, the Court, at pages 135 and 136, said:

"And at the last term in Chouteau *v.* Gibson, 111 U. S., 200, it was said: 'From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record not only that a Federal question was raised and presented to the highest court of the State for decision, but that it was decided or that its decision was necessary to the judgment or decree rendered in the case.' Murdock *v.* Memphis, 20 Wall., 590–636."

In Chouteau *v.* Gibson, 111 U. S., 200, *supra*, the Court said:

"From the beginning it has been held that to give us jurisdiction in this class of cases it must appear affirmatively on the face of the record not only that a Federal question was raised and presented to the highest court of the State for decision, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case. Murdock *v.* Memphis, 20 Wall., 590–636."

(*c.*) The order sought to be reviewed by this Court is not a final judgment or decree within the meaning of the United States Revised Statutes, Section 709, because the plaintiff in error has not exhausted his remedy in the courts of the State of New York in such manner as to entitle him to be heard by the Court of Appeals, the highest court of the State of New York in which a decision of a suit presenting the Federal question could be had, as he has not commenced or prosecuted any suit, where the question could be fully determined by that Court as to whether the plaintiff in error is entitled to the injunction, which he sought to obtain by motion, or by submitting himself to the jurisdiction of the State Court, where on contempt proceedings the question here sought to be raised could be carried to the Court of Appeals.

**The jurisdiction of the Court of Appeals of the State of New York is governed by Sections 190 and 191 of the Code of Civil Procedure.**

**(1.) An appeal may be taken to that Court *as a matter of right from judgments or orders finally determining actions or special proceedings* and from orders granting new trials on exceptions.**

**All other appeals can only be taken when allowed by the Appellate Division of the Supreme Court of the State of New York.**

**The plaintiff in error has not seen fit to bring up the question he here seeks to review, in the State Courts in such manner as would entitle him to be heard in the Court of Appeals before coming to this Court.**

**The two sections of the Code of Civil Procedure of the State of New York are as follows:**

SECTION 190: THE JURISDICTION OF THE COURT OF APPEALS IN CIVIL ACTIONS.

The Court of Appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, eighteen hundred and ninety-five, at a general term of the supreme court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the court of appeals. From and after the last day of December eighteen hundred and ninety-five, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the Appellate Division of the Supreme court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the appellate division of the supreme court in any department where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be

reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

SECTION 191: LIMITATATIONS, EXCEPTIONS AND CONDITIONS.

The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court or a surrogate's court, unless the appellate division of the supreme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of appeals.

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors or in an action to recover wages, salary or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking on appeal when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals or unless in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals.

3. The jurisdiction of the court is limited to a review of questions of law.

4. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals.

In Colwell *v.* Tinker, 169 N. Y., 531, the Court at page 538 distinctly recognizes the right of a person

adjudged bankrupt to prosecute an *action* to procure a determination of the effect of a discharge in bankruptcy upon a judgment.

From a final judgment in such an action an appeal could be taken to the Court of Appeals, which Court would then have jurisdiction to determine the question. As that Court, therefore, in a proper proceeding could determine whether or not a judgment awarding alimony was a judgment for a fixed liability within the meaning of the bankruptcy act, and whether alimony due at the time of an adjudication in bankruptcy was discharged, this Court cannot entertain this writ of error until the highest court of New York has passed upon the subject.

(2.) An appeal may also be taken to the Court of Appeals from an order denying an application to discharge a person on *habeas corpus*, and in one branch of this litigation the Supreme Court of the State of New York intimated that before the plaintiff in error could have relief in respect to the allowance of alimony, or before it would be necessary to consider the effect of his discharge in bankruptcy, he should come within the jurisdiction of the Court and then a case could be presented where the question could be finally determined by the courts of the State of New York in *habeas corpus* proceedings as to his rights.

In Wetmore *v.* Wetmore (action for divorce) and Wetmore *v.* Wetmore (sequestration action), 34 Misc. Rep., N. Y., 643, Scott, *J.*, in denying an application made by the plaintiff in error, after referring to the issues of the judgment in the action for divorce and in regard to the judgment sequestrating the income of the trust estate for the benefit of the wife and children, said:

"It is not necessary upon this motion to consider the question argued at length upon the briefs of counsel, whether or not the applicant is technically in contempt of Court at the present time. At least his persistent evasion of the decrees and orders of the Court, and his unremitting and thus far successful attempts to avoid the payment of alimony to

his wife, do not entitle him to ask any favors at the hands of the Court, and afford excellent reasons why the relief, if any, to be afforded him should be limited to that to which he appears to be clearly and legally entitled. So far as concerns giving a bond to secure the support of his children and the payment of future alimony to his former wife, no order is necessary. The decree in the divorce action which provides for just such bonds, is still in force, and provides ample justification and warrant for the bonds which he now asks to be permitted to give. When he shall have indicated his respect for the decree of this Court, at least to the extent of complying with so much of its provisions as require that such bonds be given, it will be time enough to consider whether the decree in the sequestration action should be vacated and the securities held thereunder released. That decree presents a sure and certain method by which the necessities of the children can be provided for without delay or further litigation. It was only by reason of the applicant's own default that such a decree was made, and it is at least doubtful whether he should now be permitted to escape the consequences of his default by substituting for this certain provision for his children's support, the less certain provision of a mere promise to pay, no matter how solvent the surety for that promise may appear to be. *Nor should the question as to the effect of the discharge in bankruptcy upon the liability for the payment of past alimony be determined by this Court before the necessity to do so arises. That question is primarily one for the Federal courts, and is one upon which, up to the present time, those courts have not been in accord. If the applicant sees fit to bring himself within our jurisdiction, and is proceeded against here for non-payment of the alimony in arrear, it may be that the question will be presented in such a way that its decision will be necessary. At present it is unnecessary.* The applicant, although expressly admitting his present ability to comply with all the provisions of the decree of divorce, shows no greater readiness to so comply than he has heretofore done. He has not given the bonds provided for in that decree, and does not offer to do so, but seeks to give other bonds in place thereof. His offer to deposit a sum equal to the past unpaid

alimony is no compliance with the terms of the decree directing its payment. He has not even paid or tendered to his former wife the alimony which has become due since his adjudication as a bankrupt, although he concedes that that amount at least is due, and is unaffected by his discharge in bankruptcy, and he does not offer to pay it, except as a condition that he be relieved from some of the consequences of his former default.

I see nothing to justify granting any part of the motion upon the ground that the applicant has shown himself entitled to relief as a matter of discretion, nor does he show himself to be entitled thereto as a matter of strict right. His present plight is the direct result of his own acts, and no injustice will be done if he is left where he has placed himself."

## Second Point.

**As the plaintiff in error is in contempt of the Supreme Court of the State of New York in this cause, it is submitted that this Court should not entertain jurisdiction in this case, independently of the question whether or not jurisdiction has been shown by the record.**

It is the law of the State of New York that where a party is in contempt the Court will not grant an application in his favor which is not a matter of strict right. If he applies to the Court for a favor it will only be granted on condition that he purges his contempt by complying with the former order of the Court.

Johnson *v.* Pinney, 1 Paige, 646.

The plaintiff in error now submitting himself to the jurisdiction of this Court, this Court, which has no direct power to compel him to comply with

the provisions contained in the judgment of divorce, about which he does not now complain, should, before hearing him upon his writ of error, require him to submit to the jurisdiction of the courts of New York and purge himself from his contempt to them, at least, in regard to such matters. The making of such an order would not be denying the plaintiff in error any right, as on compliance with such mandate he could then be heard in this Court upon his writ of error.

It will doubtless be argued by the counsel for the plaintiff in error that no order or decree has been made formally adjudging the plaintiff in error to be in contempt, but the absence of such an order or decree is explained by the facts disclosed in the record that the plaintiff in error after the judgment of divorce was made left the State of New York and keeps himself without the jurisdiction of the Courts of that State. Nevertheless the reports in this case of the proceedings had in the Supreme Court of the State of New York and in the Court of Appeals abundantly show that the plaintiff in error is in contempt of Court; and it is quite possible because of such contempt the Appellate Division, First Department of the Supreme Court of the State of New York affirmed the Special Term order denying the relief for injunction which the plaintiff in error moved for in the Court below, and it is also possible that for the same reason his application for leave to appeal to the Court of Appeals was also denied.

It affirmatively appears from page 109c that at the time the defendant in error applied to the Appellate Division for leave to appeal to the Court of Appeals he was still in contempt.

The courts of the State of New York during the litigation in this cause and in the equity suit above referred to on various occasions have frequently referred to the fact that the plaintiff in error was flagrantly in contempt of the Supreme Court of the State of New York.

In Wetmore *v.* Wetmore, 162 N. Y., 512, Bartlett, *J.*, said:

> "We have here a defendant who is in flagrant contempt of the Supreme Court and under its well settled rule is entitled to no hearing or relief until he places himself in a proper attitude to ask it."

In Wetmore *vs.* Wetmore, 149 N. Y., 531, Haight, *J.*, said:

> "After the decree he removed with his estate from the jurisdiction of the Court and has continued ever since to refuse obedience to its mandates."

In Wetmore *v.* Wetmore, 29 App. Div. Rep. (N.Y.), 510-511, Ingraham, *J.*, speaking for the Court, said:

> "*The application was denied below upon the ground that the defendant is in contempt, refusing to obey an order of the Court or to submit himself to its jurisdiction.* Under ordinary circumstances this fact alone would be sufficient to justify the Court in refusing to grant a favor or refusing a person thus situated any incidental relief. He deliberately absented himself from the State, and although he concededly had at that time a sufficient amount of money in his possession with which he could have satisfied at least a portion of the sum that was directed to be paid for the support of his wife and children, he has persistently refused to perform any part of the duty imposed upon him of protecting and supporting those whom he was bound to protect and support, and has refused to make any provision for the support of his wife and children. This conduct, and the disposition shown by the defendant since the divorce was granted, does not entitle him to any favor, and the Court may well hesitate before granting him any relief to which he is not strictly and legally entitled."

In Wetmore *v.* Wetmore, 44 App. Div. Rep. (N. Y.), 223, O'Brien, *J.*, said:

> "Mr. Wetmore did not appear. He vouchsafed no information respecting his mode of life or his necessities, other than such intimations as were made in those affidavits which this court rejected as proof of those matters. It is true that he undertakes to evade this requirement and to excuse his non-appearance as a witness by the statement that he was in contempt for disobedience of the order requiring him to pay the alimony, and that he would have come into the State to be examined before the Referee provided the plaintiff had consented to forego those remedies to which she would be entitled as process for his disobedience of the judgment awarding alimony. That is not an excuse which can avail him. This Court knew from the record on the former appeal that Mr. Wetmore was in contempt of its process, and that fact is fully commented upon in the opinion of the Court (29 App. Div., 511). He was content upon the proceeding before the Referee simply to call the plaintiff as a witness to show that her position in life was changed, and that she had remarried, and that her present husband is a gentleman of high social standing and competent to support her. But the ground upon which the Court of Appeals placed the modification of the judgment was a change in Mr. Wetmore's circumstances and not in his wife's. Of such a change he did not make the required proof before the referee."

In Wetmore *v.* Wetmore, 79 Hun (N. Y.), 269, Judge Barrett said:

> "Every remedy given to the plaintiff by the Code of Civil Procedure for the enforcement of these provisions has been exhausted (see the Continental Trust Co. *v.* Wetmore, 67 Hun, 9). These remedies have proved unavailing, not because of Mr. Wetmore's inability, but because of his factious refusal to comply with the judgment. *His disobedience was intentional, and his purpose to nullify*

*the judgment deliberate. To effectuate this purpose he left the State and took with him all his tangible property. In plain words, he fled the jurisdiction, defied our Courts and left his wife and children to starve.*"

And at page 274:

"Under these circumstances to have apportioned the trust income and allowed Mr. Wetmore unconditionally a part of it for his individual support, would have been a mockery of justice. He has more than enough for his individual support without it. If, however, it were apportioned conditionally, what would necessarily have been the condition? Certainly the payment to the plaintiff from his other property of a sum equivalent to that apportioned to him. The apportionment would then have been a needless formality. But the Court might with propriety make a still more stringent condition, namely, the payment of the entire sum awarded by the divorce judgment. A demand for an apportionment is a demand for equity, and if Mr. Wetmore demanded that equity he should have offered to do the equity of complying with the provisions of the divorce judgment. He cannot, therefore, complain that, while he is in contempt of that judgment, the Court has done the plaintiff the partial justice of impounding the arrears and directing the future application of the entire income, from time to time, as it accrues, to the satisfaction in part of his just obligations."

In Wetmore *v.* Wetmore, 34 Misc. (N. Y.), 643, Scott, *J.*, said:

"It is not necessary, upon this motion, to consider the question argued at length upon the briefs of counsel, whether or not the applicant is technically in contempt of court at the present time. At least his persistent evasion of the decrees and orders of the Court and his unremitting and thus far successful attempts to avoid the payment of alimony to his wife, do not entitle him to ask any favors at the hands of the Court, and afford

excellent reasons why the relief, if any, to be afforded him, should be limited to that to which he appears to be clearly and legally entitled."

In Wetmore *v.* Wetmore, 8 Misc. (N. Y.), 55, 56, Ingraham, *J.*, said:

"Look for a moment at the situation presented here. The judgment of this Court provides that this defendant William B. Wetmore should pay to the plaintiff a sum of money each year. William B. Wetmore is entitled to receive for his own use a sum of money from the defendant trustee. *He has left the jurisdiction of the Court, refuses to obey its judgment, and in consequence of such absence the ordinary remedy provided for the enforcement of that judgment is impracticable* We have thus the obligation of the defendant William B. Wetmore to pay to the plaintiff this sum of money. We also have an equitable obligation of the defendant trustee to pay to the defendant William B. Wetmore the income of this trust fund as it accrues. *In consequence of the voluntary act of the defendant William B. Wetmore in leaving this State, it is impossible to proceed against him by the ordinary methods used to enforce the judgment in the action for divorce.* If he were present and subject to the jurisdiction of this Court there can be no doubt that the Court by a commitment for contempt, could compel him to apply the income from this trust fund to the payment of the amount adjudged to be paid to the plaintiff for alimony; also upon what principle can it be said, that, because he absents himself from this State and voluntarily places himself in such a position that the plaintiff cannot enforce her judgment against him by proceedings for contempt, thereby the Court has lost its power to do what it could do if he were present and submitted himself to its jurisdiction? It is true that no express precedent is cited where such relief has been granted, but neither is there any case cited that holds that the Court has not such power, and, as was

said by the Court of Appeals in the case of the National Bank *v.* Wetmore, 124 N. Y., 248, 'it is for the enforcement of the principle 'that there is no wrong without a remedy' rather than precedent that courts will seek in considering whether any or what remedy may be had in the administration of justice.'"

## Third Point.

**Neither the claim for alimony nor for maintenance and education of the infant children was a debt provable in bankruptcy, and the discharge in bankruptcy did not relieve the plaintiff in error from payment of arrears of alimony or arrears for the maintenance and education of the infant children.**

Audubon *vs.* Shufeldt, 181 U. S., 575.
Dunbar *vs.* Dunbar, 190 U. S., 340.
*In re* Nowell, 99 Fed., 931.
*In re* Shepard, 97 Fed., 187.
*In re* Anderson, 97 Fed., 321.
Turner *vs.* Turner, 108 Fed., 785.
*In re* Lachemeyer, 1 Nat. Bk. Rep., 270.
*In re* Garrett, 11 Bk. Rep., 493
Matter of Smith, 3 Amer. Bk. Rep., 18.
Maisner *vs.* Maisner, 62 App. Div. (N. Y.), 286.
Young *vs.* Young, 35 Misc. (N. Y.), 335.
People *ex rel.* Buckle *vs.* Grell, 65 N. Y. Suppl., 522.
Bishop on Marriage and Divorce, Section 837.
And see Tinker *vs.* Colwell, 193 U. S., 473.

## Fourth Point.

**Under the law of New York alimony provided for by a decree of divorce is not regarded as a debt, or a fixed liability within the meaning of the Bankrupt Act, but as a legal determination of the duty owing from husband to wife.**

Romaine *vs.* Chauncey, 129 N. Y., 566.
Wetmore *vs.* Wetmore, 79 Hun (N. Y.), 268; affirmed, 149 N. Y., 520.
Maisner *vs.* Maisner, 62 App. Div. (N. Y.), 286, *supra.*
Code Civil Procedure, N. Y., § 1759.

New York Code of Civil Procedure, Section 1759, relates to divorce actions brought by a wife and provides in part as follows:

"2. The Court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties."

That a judgment for alimony and for the support of the infant children under the New York law *is not a debt, was argued by the plaintiff in error in the equity suit*, which resulted in impounding the income of the trust fund, established in his father's will for his benefit, to the defendant in error.

In speaking of Romaine *v.* Chauncey, this Court in Audubon *v* Schufeldt, *supra*, said at page 579:

> "In Romaine *v.* Chauncey (1892), 129 N. Y., 566, it was held by the Court of Appeals of New York that alimony was an allowance for support and maintenance, having no other purpose, and provided for no other object; that it was awarded, not in payment of a debt, but in performance of the general duty of the husband to support the wife, made

specific and measured by the decree of the Court; and that a court of equity would not lend its aid to compel the appropriation of alimony to the payment of debts contracted by her before it was granted."

In Wetmore *vs.* Wetmore, 79 Hun (N. Y.), 268, the Court at page 271 says:

"Why, it may be asked, should not the income of this trust fund be thus subjected? The *appellants* (plaintiff in error was one) *say, because under the rule laid down in Romaine* v. *Chauncey* (*129 N. Y., 566*), *alimony is not strictly speaking a debt* due to the wife from her husband, nor, consequently, is her claim thereto that of an ordinary creditor. From this postulate the appellants reason that as it is only a creditor who under the statute, can reach surplus income beyond what is necessary for the support of the beneficiary the plaintiff -not being such creditor, is wholly without equity.

The answer to this position is, that the rights of the wife and children do not depend upon mere definitions of the term 'alimony,' and that her and their claim to support is higher and greater than that of an ordinary creditor. The question is not whether these children have become, by operation of law, their father's creditors; nor whether the divorce judgment has transformed the wife and husband into the technical relation of creditor and debtor; but whether the provision duly made for her support and for the support of the children—no matter how it may be styled or what it may be likened unto—shall be enforced.

We have said that the claim of the wife and children to support is higher and greater than that of an ordinary creditor. We mean this in a legal as well as in a moral sense, and for this reason: The beneficiary's wife and children *are included in the personal use to which the income of the trust fund is to be applied.* All the cases where surplus income has been applied to the claims of creditors limit the surplus to what may remain after making due provision for the suitable support and maintenance of the *cestui que trust and those dependent upon him.* The Court first determines what is necessary for the support, not of the debtor alone, but of him *and his family* (Williams *vs.* Thorn, 70 N. Y., 270; Tolles *vs.* Wood, 99 *Id.*, 618; McEvoy *vs.* Appleby, 27 Hun, 44)."

In Wetmore *v.* Wetmore, 149 N. Y., 520, it will be seen from the briefs of counsel as reported that the trustee under the will of Samuel Wetmore contended in the Court of Appeals that under the judgment of divorce the defendant in error was not a creditor of the plaintiff in error, and in the argument for the plaintiff in error in that case he contended that if the judgment for alimony constituted a debt that he was entitled to the protection afforded by the statute in regard to allowing him a sum for maintenance and support out of the income of the trust fund. The respondent on that appeal (the defendant in error here) contended as in the lower courts that she was entitled to impound the trust fund independently of any statute relating to creditors' action, under the general powers of the Court as a court of equity under the peculiar circumstances of that case. The Court in writing the opinion recognized this latter claim, saying:

"The will creating the trust for the benefit of William makes no mention of his wife. And yet, owing to their unity of person and his duty to support her, equity will not permit the interposition of creditors until there is a surplus over and above that which is necessary for the support of himself, his wife and infant children. (Williams *v.* Thorn, 70 N. Y., 270: Tolles *v.* Wood, 99 N. Y., 616; Sillick *v.* Mason, 2 Barb. Chan., 79).

Equity will not feed the husband and starve the wife. Neither will it favor the wife to the detriment of the husband. Treating them as one, and both entitled to support out of the income of the estate, so far as creditors are concerned, furnishes a just rule and a safe basis for adjustment where the question of support arises between themselves."

It is contended by the plaintiff in error that the defendant is regarded as a judgment creditor; in support of which contention the opinion of the Court in Wetmore *vs.* Wetmore, 149 N. Y., 52, is cited. We do not understand that such opinion so holds, but on the contrary it approves Romaine *vs.* Chauncey.

In Maisner *v.* Maisner, 62 App. Div., N. Y., 286 (*supra*), which came before the Court on a question under the present Bankruptcy Act similar to the one now presented, namely, as to whether a discharge in bankruptcy relieves the bankrupt from payment of past due alimony, &c., it was contended, as here, that the opinion in the Wetmore case held that alimony was a debt, and in that regard the Court, in holding that past due alimony was not discharged, says:

"IT WILL BE NOTICED THAT IN SOME OF THE OPINIONS of the judges in the bankruptcy courts, their views are based upon the nature of alimony as defined by the tribunals of the States within which such bankruptcy courts exercise jurisdiction, and it has been argued that under the decisions of the courts of the State of New York, alimony has been declared to be a debt due from the husband to the wife and enforciable as a debt. To sustain this position, we are referred among others to the case of Wetmore *v.* Wetmore (149 N. Y., 520), in which it was held that the effect of a judgment in an action for divorce awarding alimony to a wife directed to be paid by the husband, is to make her a creditor of the husband, within the intention of the Statute of Uses and Trusts, and that after having exhausted the remedy given her by the Code to obtain payment of alimony she is entitled to the remedies of a judgment creditor given by that statute, and in the opinion of the Court it is said that after the entry of the judgment awarding alimony, the husband is in effect a debtor owing his wife the amount adjudged and determined by the decree. BUT NEITHER THE WETMORE CASE NOR OTHERS CITED BY THE APPELLANT HAVE DECLARED THE ALLOWANCE OF ALIMONY TO BE THE ENFORCEMENT OF A DEBT DUE FROM A HUSBAND TO HIS WIFE, NOR PUT A JUDGMENT AWARDING IT IN THE CATEGORY OF ORDINARY MONEY JUDGMENTS. The nature of alimony is defined in Romaine *v.* Chauncey (129 N. Y., 566), as being incidental to a decree of divorce in favor of a wife and simply an allowance for her support and maintenance. It is an admeasurement by the court of the marital obligation of support which obligation is made specific and the allowance becomes a debt only in the sense that the general duty over which the husband previously

had a discretionary control has been changed into a specific duty. We do not understand the Wetmore case as being intended to establish any other view of the nature of alimony."

The following language from the opinion by Judge Baker in the Matter of Turner is also adopted in Maisner *v.* Maisner, *supra:*

"We have seen that alimony is not a debt reduced into judgment. It is a sum of money awarded for the wife's support in the enforcing of a marital duty, and it does not constitute a debt in the true sense of that word. The Court will look beyond the form of the judgment. It will look at the nature of the liability, the original cause of action. The duty of marital support springs out of the contract of marriage and continues until dissolved by death or the judgment of a competent court. A discharge in bankruptcy will not release a bankrupt from his obligation of support. The wife, during the marital relation, cannot prove her claim for support against the estate of her bankrupt husband. If a discharge will not release the bankrupt husband from his liability to furnish his wife support, why should such discharge absolve him from the performance of this duty when, on account of the violation of the marriage contract, a court has decreed the amount of money that he should pay in satisfaction of this duty?"

Under the authorities heretofore cited the husband has not been regarded as relieved from the payment of alimony by virtue of his discharge in bankruptcy. Such was the rule under the old Bankruptcy Act, as well as under the present. There are a few decisions to the contrary, but they would seem to turn upon the fact that under the law of the jurisdiction where given, alimony was treated more in the nature of a debt than a duty. For instance see *In re* Houston, 94 Fed , 119, which must be deemed to be questioned if not overruled by Audubon *vs.* Shufeldt, *supra.*

If the discharge in bankruptcy relieved the plaintiff in error from the payment of accrued alimony

and moneys due for the support of his children, they would be deprived of collecting the same from a fund over which the Bankruptcy Courts had no control under the decisions of the State of New York.

The sequestration action by which the income of the trust fund was impounded, provided a fund applicable to the payment of arrears as they might be due. The Bankruptcy Court had no control over the income from that fund.

In Butler *v.* Baudouine, 84 App. Div., 215, it was held that under the fifth paragraph of Subdivision A of Section 70 of the Bankruptcy Act, which vests a trustee in bankruptcy with all the estate and property of the bankrupt "which prior to the filing of the petition he could by any means have transferred or which might have lawfully been sold under judicial process against him," is not entitled to commence an action under Section 78 of the New York Real Property Law, which provides that where a trust is created for the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of the beneficiary's creditors in the same manner as other personal property which cannot be reached by execution, as such surplus is only available to judgment creditors who have exhausted their remedies at law. A wife, however, as shown above comes in ahead of such creditors.

If the argument is sound that the provisions for alimony and support were a fixed liability within the meaning of the Bankrupt Act, because the Courts of New York have not power to change its provisions great injustice would be done in regard to persons in that State, as the subject of alimony and the enforcement of its payment is varied.

In Maisner *v.* Maisner (*supra*), the Court says:

"When it (alimony) is awarded, the Court takes into its own hands the regulation of the duty of the

husband to support his wife, and it may provide in its decree for a modification of its terms if it so chooses. It has the power to compel obedience to the decree by other methods than those ordinarily resorted to to enforce a judgment. It may require the husband to give security for the payment from time to time of the alimony awarded or it may cause his personal property and the rents and profits of his real property to be sequestrated and may appoint a receiver thereof, or upon default in the payment of alimony, under certain circumstances it may enforce payments by proceedings for contempt, as in the case now before us."

If the question should turn upon whether or not there is power in the Court to modify a decree it can readily be seen that amounts due under New York decrees granting leave to apply for a modification thereof would not be discharged, whereas New York decrees without such provisions would. Moreover, even though the Court may have power to modify a decree, still, until such discretion is exercised, the amount due is equally as much a fixed liability as is the amount due under a decree over which the Court has not such discretion.

A decree providing for alimony is not in its nature an ordinary judgment for a fixed liability. While the Court could not, perhaps, change the amount, it could indirectly preclude the plaintiff from recovering the amount. The manner of enforcing alimony is provided for by Sections 1772 and 1778 of the New York Code of Civil Procedure which in 1899 were as follows:

SECTION 1772 SUPPORT, MAINTENANCE, ETC., OF WIFE AND CHILDREN. SEQUESTRATION.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion also direct him to give reasonable security in such a manner, and within such a time, as it thinks proper, for the payment, from time to time of the sums of money required for that

purpose. If he fails to give the security or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order made as prescribed in Section 1769 of this act; the court may cause his personal property and the rents and profits of his real property to be sequestered; and may appoint a receiver thereof. The rents and profits and other property, so sequestered, may be from time to time, applied under the direction of the court to the payment of any of the sums of money, specified in this section as justice requires.

SECTION 1773 *Id.*: WHEN ENFORCED BY PUNISHMENT FOR CONTEMPT.

Where the husband makes default in paying any sum of money specified in the last section as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the Court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the Court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him as prescribed in title third of chapter seventeenth of this Act. Such an order to show cause may also be made without any previous sequestration or direction to give security where the Court is satisfied that they would be ineffectual.

If a husband owing alimony is punished as in contempt of Court for not paying the alimony prescribed, the Court may commit him under Section 1773, and he may then upon application to the Court apply for his release upon showing that he is unable to pay the amount due, under Section 2286 of the New York Code of Civil Procedure and which section is as follows:

SECTION 2286, WHEN COURT MAY RELEASE OFFENDER.

Where an offender, imprisoned as prescribed in this title, is unable to endure the imprisonment or

to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the Court, the judge or referee or, where the commitment was made as prescribed in section 2457 of this act, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order directing him to be discharged from the imprisonment.

The effect, therefore, is that while the Court does not change the amount of alimony due it releases the husband from its payment.

It was doubtless from the fact that the nature of alimony or the effect of a decree awarding alimony was regarded differently in various States, which might in some bring the judgment within the class of debts specified in the Bankruptcy Act, as being discharged, and in some States not, and in view of the decisions of this Court that alimony could not be discharged in bankruptcy, that Congress, to harmonize the effect of the marriage relation so that it should be uniform throughout the United States, beyond all question amended by Act of February 5, 1903, Section 17 of the Bankruptcy Act, so that a discharge in bankruptcy should not release a bankrupt "for alimony due or to become due or for maintenance or support of wife or child."

That the amendment to the Bankruptcy Act passed in 1903, providing that a debt due or to become due for alimony or for the maintenance and support of wife or child did not imply that such obligations were dischargeable under the Act as it formerly stood see Dunbar *vs.* Dunbar, 190 U. S., 340, where this Court, at page 353, held that that amendment only shows the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife or children, and in which case this Court held that moneys due under a contract for the support of wife and children were not released by the bankrupt's discharge, such contract being governed by the law as it stood prior to the amendment.

## Fifth Point.

**If the effect of a decree containing provisions for alimony and for support and maintenance of children is to be regarded as making the husband and father debtor to the wife and children for such amounts, even then the discharge in bankruptcy would not release the plaintiff in error from such obligation.**

It has frequently been held that the courts will examine into the inception of an obligation when it is claimed that such obligation is discharged in bankruptcy. Alimony is awarded to an innocent wife merely for her support and maintenance, but the inception of its award and the reason it is definitely measured by the Court is on account of the wilful and malicious injury to the person and property of the wife. That the acts upon which the decree contained in this record were wilful appeared from the verdict of the jury at page 58, where it found that the plaintiff in error had committed all the acts charged with the exception of one. From the complaint, at page 38, it will appear that fifteen specific acts were set forth. That such acts were wilful and malicious as against the wife and children and invaded the person of the wife and the property of the wife and children is self evident.

The words of Bartlett, *J.*, in Colwell *v.* Tinker, 169 N. Y., 531, which was an action for criminal conversation, and where the effect of such acts upon the property and rights of a husband is stated are equally applicable to the injury done to a wife by her husband's adulterous intercourse. He says:

> "While loss of service is usually pleaded in this form of action, yet its real foundation is the personal injury inflicted upon the husband. The offense charged is a most grievous wrong against social order and society; it strikes at the foundations of the home and

the legitimacy of offspring. The husband, who is entitled to live with his wife and enjoy her society in the marriage relation, finds himself humiliated and to a certain extent, disgraced by a public scandal; the marriage bed is dishonored; his domestic peace and comfort are destroyed and he is subjected to great mental suffering.

* * * * *

A person voluntarily invading and destroying the marriage relation is guilty of a wilful, wanton act, and it is not necessary to prove that he was moved by hatred, revenge or passion towards the husband. The law in such a case implies malice, and the judgment that follows is for both a wilfull, and malicious injury to the person and property of another.

The policy of the Bankrupt Law is to discharge the honest and unfortunate debtor from his contract obligations, and not free him from judgments involving his fraud, which implies moral turpitude or intentional wrong, or judgments for wilful and malicious injuries to the person or property of another."

As said by Bishop,

"A breach of marriage duties, such as authorizes divorce, is a civil tort, and the divorce suit is in essence an action of tort, though not technically known by this name."

Bishop on Mar. and Div., Vol. 2, p. 220.

The law does not permit actions between husband and wife for torts of such a nature.

Amer. & Eng. Encyc. of Law, 2d Ed., Vol. 15, p. [redacted].857

The only remedy therefore which a wife has for a breach of marital duties by the husband is an action for divorce or separation according to the magnitude of the act. The commission of such acts are, nevertheless, wilful and malicious injuries to the person and property of the wife, and it is on account thereof that the Court, in freeing the wife,

decrees the measures of the husband's obligation to support and maintain the wife.

It would, therefore, follow that if the decree for alimony and support of his children changed the guilty husband's obligation to that of a debt, it would be a debt incurred for his wilful and malicious injury to the person or property of others, and, therefore, not discharged under Section 17 of the Bankruptcy Act.

## Sixth Point.

**The writ of error should be dismissed, or the order brought up for review affirmed.**

Respectfully submitted,

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Dated October 10th, 1904.

Flamen B. Candler
of Counsel for Defendant
in Error.